

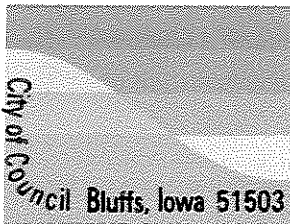
OFFICE OF:
CITY CLERK
(712) 328-4616

**ADDENDUM TO
STUDY SESSION AGENDA**

**CITY COUNCIL STUDY SESSION
COUNCIL CHAMBERS
MONDAY, September 22, 2008
3:45 P.M.**

- A. Review of Agenda
- B. Closed Session:
Property Acquisition





OFFICE OF:
CITY CLERK
(712) 328-4616

COUNCIL AGENDA, CITY OF COUNCIL BLUFFS, IOWA
REGULAR MEETING SEPTEMBER 22, 2008, 7:00 P.M.
COUNCIL CHAMBERS, 2ND FLOOR, CITY HALL
209 PEARL STREET

ADDENDUM TO AGENDA

Add:

3. CONSENT AGENDA

K. Approval of Addendum to Agenda

6. RESOLUTIONS:

R. Resolution 08-299, authorizing the Mayor to execute amendment to development agreement between Pottawattamie County Development Corporation (PCDC) and Broadway Ventures LLC.



Council Communication

Department: Legal	Ordinance No.	
Case/Project No.	Resolution No. <u>08-299</u>	Date: <u>September 22, 2008</u>
Subject/Title		
Resolution authorizing the Mayor to approve an Amendment to the Development Agreement between Pottawattamie County Development Corporation (PCDC) and Broadway Ventures, LLC.		
<p>The initial agreements between the City and PCDC provided that the City would approve all agreements with developers. The City has reviewed and approved the development agreement with Seldin and the various amendments over the last couple years.</p> <p>Attached for City approval is what should be the final amendment. The substantive provision of this agreement is that Seldin will purchase Lot 3, which was originally to be purchased by Hy-Vee for a gas station. As you know, Hy-Vee backed off on its intention to build a gas station because of environmental concerns. A covenant has been placed on the property that will prohibit gas stations.</p> <p>Exhibit A which is not attached is an environmental indemnity agreement between PCDC and the purchasers. PCDC will continue to perform environmental remediation on the property for a period of time.</p> <p>The parties hope to close, as early as this next week, on the sale of Lots 2 and 3 and the PCDC property south of the tracks (23 lots) to Seldin. That is all the remaining property.</p>		
Recommendation		
Approve Resolution authorizing the Mayor to approve the Amendment to the Development Agreement between Pottawattamie County Development Corporation (PCDC) and Broadway Ventures, LLC.		

Department Head Signature

Mayor Signature

RESOLUTION NO. 08-299

A RESOLUTION authorizing the Mayor to approve the Amendment to the Development Agreement between Pottawattamie County Development Corporation (PCDC) and Broadway Ventures, LLC.

WHEREAS, the initial agreements between the City and PCDC provided that the City would approve all agreements with developers; and

WHEREAS, PCDC and Broadway Ventures, LLC entered into a Development Agreement dated May 20, 2005. Amendments were entered into on July 26, 2007 and November 26, 2007; and

WHEREAS, it would be in the best interests to authorize the Mayor to approve the Amendment to the Development Agreement between PCDC and Broadway Ventures, LLC.

NOW, THEREFORE, BE IT RESOLVED

BY THE CITY COUNCIL

OF THE

CITY OF COUNCIL BLUFFS, IOWA:

That the Mayor is hereby authorized to approve the Amendment to the Development Agreement between Pottawattamie County Development Corporation and Broadway Ventures, LLC.

ADOPTED

AND

APPROVED September 22, 2008

THOMAS P. HANAFAN

Mayor

Attest:

JUDITH RIDGELEY

City Clerk

AMENDMENT TO DEVELOPMENT AGREEMENT

This Agreement is made and entered into by and between Pottawattamie County Development Corporation (PCDC) and Broadway Ventures, LLC (Developer):

1. The parties previously entered into a Development Agreement dated May 20, 2005. The parties entered into an amendment to the Agreement on June 26, 2007 and entered into a further amendment dated November 26, 2007.

2. The Development Agreement as amended includes a due diligence period. The parties have from time to time entered into agreements extending the due diligence, with the latest extension now being to September 30, 2008.

3. That part of the property that is the subject of the Development Agreement that is north of First Avenue and south of West Broadway has now been surveyed, and is included in a subdivision plat dated July 25, 2007, which has been prepared by Lamp, Rynearson & Associates, Inc. Said property is now described as Lots 1, 2, and 3 of Hy-Vee at West Broadway Subdivision.

4. Hy-Vee, Inc. has now purchased Lot 1. Hy-Vee, Inc. previously had an exclusive option on Lot 3, which has now expired.

5. The Development Agreement, as amended provides for the purchase of Lot 2 by Developer. The Development Agreement, as amended, is hereby further amended to include the purchase of Lot 3 by Developer. The purchase price for Lot 3 shall be \$7.00 per square foot and the remaining terms and conditions of the Development Agreement, as amended, shall apply.

6. The Developer also has the following exclusive options as established in the amendment to development agreement dated November 26, 2007.

- a. The option to purchase Lot 1 in the event Hy-Vee does not exercise its option is no longer applicable.
- b. An option to purchase Lots 1 through 23 in Block 4, Wright's Addition.

The option to purchase Lots 24 and 25, Block 37 Central Subdivision is no longer applicable.

7. Developer's due diligence to purchase Lot 2 & 3 and Developer's options to purchase Lots 1-23, Block 4, Wrights Addition shall be extended until: Fifteen (15) business days after Developer's title and survey objections

on Lot 3 are resolved to its satisfaction in its sole judgment. Closing shall occur within 30 days after the expiration of the due diligence period, provided Developer has exercised its right to proceed with same within the due diligence period.

8. PCDC represents that there are two registered environmental sites on Lot 2: Finish Line (Registration No. 198605033; LUST No. 8LTC26) and Harmon Glass (Registration No. 197910551; LUST No. 9LTM20). Both sites relate to leaking fuel tanks which were previously located on the property.

9. PCDC represents that: a) The Finish Line site is eligible for 100% reimbursement of costs for remediation and monitoring (subject to prior budget approval) up to a cap of one million dollars (\$1,000,000.00); b) As of May 16, 2008, a total of \$134,022.86 has been reimbursed on the site; c) An excavation of the site was recently completed and post-excavation monitoring will be required into the future; and d) Thiele Geo Tech estimates the cost of the excavation and post-excavation monitoring to be \$450,000.00.

10. PCDC represents that: a) The Harmon Glass site is eligible for 100% reimbursement of for remediation and monitoring costs (subject to prior budget approval) up to a cap of one million dollars (\$1,000,000.00) b) Three Hundred Fifteen Thousand Five Hundred Twenty-Seven Dollars and Seventy-Seven Cents (\$315,527.77) has been reimbursed on this site to date; and c) The IDNR has accepted the Tier III monitoring plan at this site.

11. PCDC agrees to execute and record environmental agreements at closing in the form attached hereto as Exhibit "A" for Lots 2 and 3.

12. PCDC shall include Developer or its designee in any negotiations and material discussions with IDNR, the Underground Storage Tank Fund, or other environmental governmental agency in regard to the Required Remediation. PCDC will further include Developer in any discussion regarding agreements concerning use restrictions, environmental covenants and/or modifications of remediation requirements; any agreements concerning same including without limitation modifications of same, shall be subject to Developer's prior approval. PCDC agrees it will not request a Certificate of No Further Action with regard to the Finish Line and/or the Harmon Glass site until Developer agrees that it is the proper time to do so.

13. Paragraph 15 of the original Development Agreement provides that Developer will accept the property in "as is, where is" condition. The parties acknowledge that the foregoing provision does not negate the responsibility of PCDC to address the environmental sites identified in paragraph 8 hereof in the manner provided for in the Development Agreement, as amended.

14. PCDC will procure before closing a written acknowledgment acceptable to Developer from USTF for continued payment of costs and expenses for the PCDC remediation and/or monitoring per paragraph 9 and 10

above following the transfer of title to Developer and any transferee of Developer.

15. The parties acknowledge that the Development Agreement was approved by the City of Council Bluffs. This Addendum will likewise not become effective and binding upon the parties until it has been approved and authorized by the City of Council Bluffs. Upon execution of this Addendum, PCDC will promptly schedule City Council action to approve of same, and if such approval is not obtained by September 22, 2008, Developer shall have the right at any time thereafter to terminate the Agreement by notifying PCDC thereof. Upon any such termination, Developer shall be entitled to a return of its deposit. Upon PCDC obtaining City Council approval or denial, it shall immediately notify Developer.

16. Developer shall have the right to terminate the Development Agreement as to any separate property covered thereby and be entitled to a refund of its deposit (or prorata by land area for any partial termination), if at any time the environmental condition of the Property including without limitation the ability to construct the building, utilities and associated improvements it contemplates for the Property due to environmental issues or restriction on the development or use thereof imposed by IDNR or other environmental governmental agency, which were unknown to Developer during the due diligence period, is unacceptable to Developer in its sole discretion.

17. Within the due diligence period, PCDC shall terminate existing utility easements in the vacated alley on Lot 3.

18. Section 11 of the original Development Agreement dated May 20, 2005 shall be amended to add the provision that PCDC shall at closing assign the existing communications tower lease to Developer and all rents shall be prorated as of the date of closing. PCDC shall procure an estoppel certificate from Tenant to be dated within thirty (30) days of closing which states matters satisfactory to Developer including but not limited to the status of the lease and rents and whether the Landlord (PCDC) is in any default thereunder.

19. PCDC agrees to assist Developer in the following regards:

- a) To obtain Hy-Vee's approval to allow for a change in the height restriction applicable to Lot 2 to allow for a higher architectural element;
- b) To obtain the rezoning of Lot 1-23, Block 4, Wrights Addition.
- c) To obtain approval of IDNR of proposed construction plans on Lot 2 and Lot 3; and

d) To obtain a letter or statement from IDNR that in the future they will only require monitoring in regard to known contaminants on the Harmon Glass site.

This obligation shall survive the closing.

20. In regard to Lot 3, the parties agree to enter into an assignment and assumption agreement at closing for the escrow agreement attached hereto as Exhibit B whereby PCDC assigns, and Developer assumes, the rights and obligations thereunder. Developer shall reimburse PCDC at closing for the amounts of this escrow as applicable for Lot 3 and Developer or its assigns shall be entitled to the payment from the escrow agent upon the release of the escrow. In regard to the escrow agreement with the City applicable to Lot 2, the parties acknowledge that Developer's purchaser First National Bank of Omaha, N.A. will provide a substitute escrow agreement at closing.

21. In the event that Developer elects to purchase the property, and if Developer elects to effectuate an Internal Revenue Service Section 1031 Exchange, PCDC agrees to cooperate with Developer to facilitate such like-kind exchange at no cost to PCDC.

Dated: _____

Pottawattamie County Development
Corporation

By: _____
A.W. Tauke, President

Dated: _____

Broadway Ventures, LLC

By: Northwood Properties, Inc.,
Manager

By: _____
Randall Lenhoff, President

EXHIBIT B

AGREEMENT FOR ESCROW OF SECURITY FUND

WHEREAS, Pottawattamie County Development Corporation; of Council Bluffs, Iowa, hereinafter called "Developer" has made application to the City of Council Bluffs for permission to construct Hy-Vee on West Broadway Subdivision improvements consisting of paving and storm and sanitary sewer improvements within the plat of

Lots 1 through 13, inclusive, Block 38, CENTRAL SUBDIVISION; Lots 1 through 6, inclusive, Block 4, COCHRAN'S ADDITION; Lots 1 through 9, inclusive, MARTINS SUBDIVISION; Lots 5 and 6, and the West Half of Lot 4, Block 2, STREET'S ADDITION, Lots 1 through 18, inclusive, Block 1, WRIGHT'S ADDITION, AND Lots 1 through 4, inclusive, AUDITOR'S SUBDIVISION OF LOTS 19 THROUGH 23, INCLUSIVE IN BLOCK 1, WRIGHT'S ADDITION, subdivisions, as surveyed, platted and recorded in Pottawattamie County, Iowa, TOGETHER WITH all vacated streets and alleys within the bounded area, EXCEPT a twenty foot chamfer in the northwest corner of Lot 13, Block 38, in said CENTRAL SUBDIVISION, the entire tract described by metes and bounds as follows: Beginning at a 5/8" rebar with 1 1/4" yellow plastic cap stamped LS 11973 at the intersection of the south right of way line of West Broadway with the west right of way line of South 23rd Street; Thence South 00°44'31" West (assumed bearings) for 371.88 feet along said west right of way line to a 5/8" rebar with 1 1/4" yellow plastic cap stamped LS 5414 in the north right of way line of 1st Avenue; Thence North 89°09'58" West for 890.63 feet along said north right of way line to a 5/8" rebar with 1 1/4" yellow plastic cap stamped LS 11973 in the east right of way line of South 25th Street; Thence North 01°03'01" East for 352.94 feet along said east right of way line to a 5/8" rebar with 1 1/4" yellow plastic cap stamped LS 11973 and the southerly corner of said twenty foot chamfer; Thence North 46°06'58" East for 28.32 feet along the twenty foot chamfer line to a 5/8" rebar with 1 1/4" yellow plastic cap stamped LS 11973 in the south right of way line of West Broadway and the easterly corner of said twenty foot chamfer, Thence South 89°06'04" East for 868.67 feet along said south right of way line to the Point of Beginning. Contains 7.601 acres

in the City of Council Bluffs, Pottawattamie County, Iowa.

WHEREAS, Developer desires to construct and install the aforesaid improvements on Lot 3 of Hy-Vee on West Broadway Subdivision privately and guarantee the same by placing funds in an escrow account as security for performance of said construction rather than posting performance bonds. Hy-Vee, Inc. will construct and

install all of the aforesaid improvements on Lot 1 of Hy-Vee on West Broadway Subdivision and will separately post a performance bond or place the funds in escrow.

NOW, THEREFORE, IT IS AGREED by and between Pottawattamie County Development Corporation and the City of Council Bluffs, Iowa a municipal corporation, hereinafter called "City" as follows:

1. That prior to Final Plat Approval of the aforesaid improvements, and recording of the plat, Developer shall deposit the sum of \$ 35,871.11 with Frontier Savings Bank as escrow agent for the City, the same to be held in escrow as security to guarantee the construction of aforesaid improvements. Exclusive of any guarantee period and of any valid extension of time granted by the City all work shall be completed on or before 36 months from the date of this agreement.
2. The funds designated for any one improvement less the retainage, if any is provided for in the Developer's agreement with contractors, may be partially released from Escrow by Frontier Savings Bank to the Developer when authorized by the City Engineer. The final release of the funds in the account designated as the security shall not be made until the improvements have been completed to the satisfaction of the City and the City has certified to Frontier Savings Bank by certified letter from the City Engineer of the City of Council Bluffs that the construction has been completed for that improvement and the funds can be released. In the event any or all of the aforesaid improvements are not completed to the satisfaction of the City by the completion dates listed in paragraph 1, supra, the City shall have the right to complete said improvements. Upon completion of same the City shall request payment from Frontier Savings Bank and shall provide the Frontier Savings Bank with a certification evidencing completion of same. Upon receipt of said request for payment and certification of completion Frontier

Savings Bank shall pay to City the balance of the escrow fund or the amount certified by the City Engineer as being expended, whichever is the lesser.

3. The conditions of final release of the escrow funds upon completion of the improvements set forth in paragraph 2, supra, shall include payment in full of any and all costs due to the City by the Developer in connection with the development and construction of such improvements including, but not limited to, engineering costs, inspection costs, and survey costs.

4. This Agreement shall be contingent upon its execution by the parties hereto, the deposit of the required security funds with Frontier Savings Bank as escrow agent for the City of Council Bluffs, and the acceptance of this Agreement by said agent.

5. Frontier Savings Bank shall be liable as a depository only.

6. Upon deposit of the security funds as provided in this Agreement, the City agrees to waive the requirements that Developer post performance bonds for completion of the aforesaid improvements.

7. The escrow account shall draw interest and interest accrued shall belong to Developer or its assignee and shall be added to and become a part of the escrow funds.

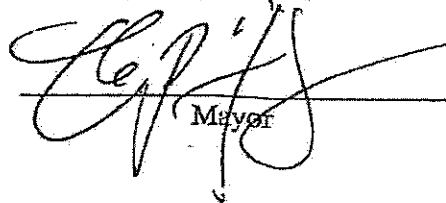
8. Developer and its successors and assigns may assign its rights and obligations under this agreement, including its right to the escrow funds, to its successor in title to Lot 3 of Hy-Vee on West Broadway Subdivision.

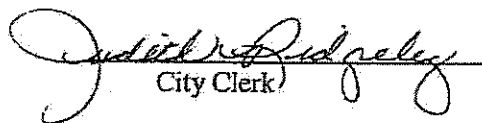
IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be
executed this 27th day of August, 2008.

Pottawattamie County Development
Corporation

By: 
A. W. Tauke, President

City of Council Bluffs, Iowa
a municipal corporation,


Mayor


City Clerk

Approved:


City Attorney

ACCEPTANCE OF ESCROW AGREEMENT

Frontier Savings Bank hereby agrees to the terms and instructions listed in the Agreement for Escrow of Security Fund and acknowledges that it has accepted a deposit in the sum of \$ 35,871.11 from Pottawattamie County Development Corporation to be held in Escrow Account No. 611128 by Frontier Savings Bank as escrow agent for the City of Council Bluffs, Iowa, a municipal corporation, to ensure construction of the improvements listed in the above and foregoing Agreement and further agrees not to release any of said monies placed on deposit to secure construction of said improvements until it has received written authorization from City of Council Bluffs and in accordance with the "Agreement for Escrow of Security Fund".

DATED this 28th day of August, 2008.

ATTEST:

Frontier Savings Bank

By: [Signature]
Title: President CEO